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No. 97-5310

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

DAVID R. BEACH and LINDA M. BEACH, his wife,

Petitioners,

vs.

GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Florida

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Under Florida law, may an action for statutory right of rescission pursuant to the Truth-in-Lending Act, 15 U.S.C.A. Section 1635, be revived as a defense in recoupment beyond the three-year limit on the right of rescission set forth in Section 1635(f)?

PARTIES TO THE PROCEEDINGS

Respondent would add the following individuals and entities as parties to the proceedings in accordance with Federal Rule of Appellate Procedure 26.1 and Supreme Court Rule 29.6:

1. Richard W. Glenn, Esquire, attorney for Petitioners.
2. Patricia Lebow, P.A., Broad and Cassel, 400 Australian Avenue South, Fifth Floor, West Palm Beach, FL 33401 – Attorney for Respondent.
3. Ocwen Federal Bank, assignee of Respondent.
4. Ocwen Financial, Inc., parent company of Ocwen Federal Bank.

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STATEMENT OF JURISDICTION

Respondent generally agrees with the Petitioners' Statement of Jurisdiction but would state that jurisdiction is not appropriate under 28 U.S.C. § 1254(1) or Rule 10(b) of the Rules of the Supreme Court.

STATUTE INVOLVED

In addition to the statute cited by Petitioners, Respondent would include for this Court's consideration:

§ 1635(i). RESCISSION RIGHTS IN FORECLOSURE. –

(1) IN GENERAL. – Notwithstanding section 139, and subject to the time period provided in subsection (f), in addition to any other right of rescission available under this section for a transaction, after the initiation of any judicial or nonjudicial foreclosure process on the primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to rescind the transaction equivalent to other rescission rights provided by this section, if –

(A) a mortgage broker fee is not included in the finance charge in accordance with the laws and regulations in effect at the time the consumer credit transaction was consummated; or

(B) the form of notice of rescission for the transaction is not the appropriate form of written notice published and adopted by the Board or a comparable written notice, and otherwise complied with all the requirements of this section regarding notice.

(2) TOLERANCE FOR DISCLOSURES. – Notwithstanding section 106(f), and subject to the time period provided in subsection (f), for the purposes of exercising any rescission rights after the initiation of any judicial or nonjudicial foreclosure process on the principal dwelling of the obligor securing an extension of credit, the disclosure of the finance charge and other disclosures affected by any finance charge shall be treated as being accurate for purposes of this section if the amount disclosed as the finance charge does not vary from the actual finance charge by more than $35 or is greater than the amount required to be disclosed under this title.

(3) RIGHT OF RECOUPMENT UNDER STATE LAW. – Nothing in this subsection affects a consumer's right of rescission in recoupment under State law.

(4) APPLICABILITY. – This subsection shall apply to all consumer credit transactions in existence or consummated on or after the date of the enactment of the Truth in Lending Act Amendments of 1995.

STATEMENT OF THE CASE AND FACTS

Respondent disagrees with Petitioners' Statement of Facts and Case on several points. No determination has been made by any court that the disclosures given by Great Western Bank contained material errors which gave the Beaches the extended right to rescind under 15 U.S.C. § 1635. In fact, the errors contained in Great Western's disclosure statements amounted to an overstatement of the finance charge by the sum of $7.24. Based thereon, Great Western was actually at a slight disadvantage to

other lending institutions if the Beaches had credit shopped. Since the focus of the appellate courts in Florida was solely on the expiration of the right to rescind, the question of materiality was not significant.

Petitioners correctly note Great Western sued to foreclose the mortgage more than three years from the 1986 closing. In fact, more than five years had passed. To avoid any incorrect implication, it must be noted that the Beaches went into default well after the three-year expiration and only shortly before Great Western filed its foreclosure action.

Although Florida's Fourth District Court of Appeal did render a divided opinion (two judges in favor of affirmance, one dissenting) Florida's Supreme Court affirmed without dissent. The opinion issued by the Supreme Court was a per curiam affirmance joined by all judges with the exception of Justice Shaw who recused himself.

SUMMARY OF ARGUMENT

This Court should not disturb the Florida Supreme Court's decision in *Beach v. Great Western Bank*, 692 So.2d 146 (Fla. 1997). It is clear that Congress did not intend a uniform interpretation of the Truth-in-Lending Act throughout the fifty states. This is particularly true for the concept of recoupment and its applicability to the right of rescission. The Florida Supreme Court decided an issue of Florida law. Since Congress left the decision to individual states, this Court has not been presented with an important federal question which it should resolve.

The *Beach* decision is not in conflict with decisions of this Court or any of the United States Courts of Appeal. The statutes interpreted in the cases cited by Petitioner all focus on the time for bringing an action. 15 U.S.C. § 1635(f), however, specifically provides for the expiration of the right of rescission after three years. The Florida Supreme Court properly drew a distinction between statutes which focus upon the time for bringing an action and a statute which provides for the expiration of a right.

Petitioners' efforts to establish a basis for jurisdiction by discussing what they term as legislative history must also fail. The language of the statute should be the first area of focus for any court. Petitioners' assumption that Congress' actions or inactions were based upon specific court decisions, without any reference to the congressional record, does not constitute legislative history. The significance of the amendment to § 1640(e) in 1980, adding recoupment language for damage claims, while not providing for a similar amendment to § 1635(f) was properly recognized by the Florida Supreme Court and should not be ignored as the Petitioners' claim. Certiorari should not be based upon such alleged legislative history.

The Florida Supreme Court properly recognized the rescission remedy, at least in this case, would constitute a penalty. The impact of Great Western's disclosure errors was a $7.24 overstatement of the finance charge. The recovery sought by the Beaches is completely disproportionate to the harm they suffered. Rescission would not be remedial but would be a punishment designed to cause Great Western to comply in the future.

Petitioners have not provided this Court with a basis for certiorari. If this Court were to accept jurisdiction and reverse the Florida Supreme Court, it would be acting in a manner contrary to congressional intent as directly expressed in the statute. For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

ARGUMENT

CONGRESS INTENDED TO PERMIT INDIVIDUAL STATES TO REACH DIFFERENT CONCLUSIONS ON THE APPLICABILITY OF RECOUPMENT TO RESCISSION RIGHTS UNDER THE TRUTH-IN-LENDING ACT

Petitioners seek certiorari to allegedly create harmony between courts of different jurisdictions. Respondent recognizes that the Florida Supreme Court's interpretation of Florida law in *Beach v. Great Western Bank*, 692 So.2d 146 (Fla. 1997) is not in harmony with the decisions of the Colorado Supreme Court, mid-level appellate courts in New York and Illinois and two bankruptcy courts in New Jersey and Massachusetts. Nevertheless, this Court should deny the petition because it is clear Congress did not intend a harmonious interpretation on this issue. Since other courts have not issued an interpretation of Florida law, there is no significant conflict which should concern this Court.

From 1980 to 1995, there was only one provision within TILA concerning recoupment. 15 U.S.C. § 1640(e) provided that any action under that section must be brought within one year from the date of occurrence of

the violation, except that a violation may be raised in an action to collect a debt brought more than one year from the date of occurrence as a matter of defense by recoupment or set-off. Congress specifically permitted states to opt out of that recoupment provision, however, by adding the phrase "except as otherwise provided by state law". Louisiana has opted out, choosing to statutorily deny their citizens this particular recoupment right. La. Code Civ. Proc. Ann. art. 424 (West 1995).

Two years ago, Congress passed the Truth-in-Lending Act Amendments of 1995. Therein, the concept of recoupment was again addressed. In describing new provisions concerning certain rescission rights in foreclosure, Congress, in a subsection entitled "RIGHT OF RECOUPMENT UNDER STATE LAW" stated that "[n]othing in this subsection affects a consumer's right of rescission in recoupment under state law." 15 U.S.C. § 1635(i)(3). Thus, Congress clearly was empowering each state to determine whether recoupment was appropriate for Truth-in-Lending Act rescission claims. Since Congress recognized this as an issue which could be dealt with by individual states, this Court should not disturb the determination by Florida's highest court that recoupment is inappropriate under the circumstances of this case.

Congress' intent to allow states to independently reach different conclusions is made even clearer by examining 15 U.S.C. § 1635(i)(1) and (2) (also added by the 1995 amendments). If Congress intended to uniformly permit borrowers to raise rescission defensively beyond the three (3) year expiration of the right to rescind, as Petitioners argue, it clearly would not have subjected the newly created rescission rights in foreclosure, embodied

in subparagraphs 1 and 2, "to the time period provided in subsection (f)" (15 U.S.C. § 1635(f)). Once again, Congress has made it clear that uniformity in interpreting this statute is not critical and perhaps is not even desired. For the foregoing reasons, certiorari should be denied.

BEACH IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR THE FEDERAL CIRCUITS

Petitioners rely largely on this Court's opinions in *Reiter v. Cooper*, 113 S.Ct. 1213, 507 U.S. 258, 122 L.Ed. 2d 604 (1993) and *Bull v. United States*, 295 U.S. 247, 55 S.Ct. 695, 79 L.Ed. 1421 (1935) and the United States Court of Appeals for the Eleventh Circuit's decision in *In re: Smith*, 737 F.2d 1549 (11th Cir. 1984). Each of those cases recognized the propriety of permitting time barred claims to be raised defensively as a matter of recoupment. The significant distinction, however, is that those three cases dealt with statutes which, on their face, were classic statutes of limitation. They all provided for the bringing of an action within a particular time. Only *In re: Smith* dealt with the Truth-in-Lending Act and it specifically focused on the damage provision referenced above (§ 1640(e)).

Significantly, *In re: Smith* did not reach the conclusion that TILA claims are subject to recoupment. Since Ms. Smith was actually seeking affirmative relief and could not meet the other prongs of the *Bull v. United States* test, the court chose not to decide whether a defensive TILA claim is more in the nature of a set-off or a recoupment. Petitioners' heavy reliance on *In re: Smith* is misplaced.

A significant distinction must be drawn between the statutes analyzed in *Reiter v. Cooper*, *Bull v. United States*

and *In re: Smith*, and 15 U.S.C. § 1635(f). Section 1635(f) states: "[a]n obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this chapter have not been delivered to the obligor, . . . " The language specifically focuses on the expiration of the right to rescind. There is nothing ambiguous about that language.

Expiration is defined as: termination for mere lapse of time; coming to close; termination or end. Black's Law Dictionary 519 (5th Ed. 1979). The mandatory expiration of the right after three years is reiterated in 12 C.F.R. § 226.23(a)(3) and reinforced in paragraph 23(a)(3)-3 of the Official Staff Commentary which states:

> 3. Unexpired Right of Rescission. When the creditor has failed to take the action necessary to start the three (3) business day rescission period running, the right to rescind automatically *lapses* on the occurrence of the earliest of the following three events:
>
> • The expiration of three (3) years after consummation of the transaction. . . .

(emphasis added). Lapse is defined: "to become void through lack of attention." The New Lexicon Webster's Dictionary of the English Language 556 (Encyclopedic Ed. 1987).

Like Florida's courts, this Court has recognized that a court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed. 2d 694 (1984). That intent is reemphasized by the language of Regulation Z and the Official Staff Commentary which is binding on the courts unless demonstrably irrational. *Ford Motor Credit Company v. Milhollin*, 444 U.S. 555 (1980).

Notwithstanding Petitioners' argument to the contrary, the *Beach* opinion is consistent with *Reiter v. Cooper*, *Bull v. United States*, and *In re: Smith*, because it takes into consideration Congress' and the Federal Reserve Board's specific language which reference the expiration of the right of rescission and the lapse of the right to rescind. If this Court accepts jurisdiction and reverses the Florida Supreme Court, it must ignore the specific language chosen by Congress and the Federal Reserve Board in limiting the right to rescind as opposed to limiting actions to seek the remedy of rescission. It must also ignore the distinct difference between the language used in § 1635(f) and the language used in § 1640(e). As a general rule, "[w]here Congress includes particular language in one section of a statute but omits it another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed. 2d 17 (1983). This Court should not render part of the Truth-in-Lending Act meaningless by interpreting § 1635(f) as a statute of limitation rather than an express direction that the right itself expires and cannot be revived after three (3) years have passed.

Petitioners insist that this Court in *Reiter v. Cooper*, adopted *In re: Smith* and somehow has by such action, embraced *In re: Smith* as providing for recoupment in connection with truth-in-lending rescission claims. First,

it is clear that this Court in *Reiter v. Cooper* was simply recognizing that the Eleventh Circuit, in *In re: Smith*, understood that this Court's holding in *United States v. Western Pacific R. Co.*, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed. 2d 126 (1956), constituted a general principle of recoupment which was applicable in other contexts. While it is perhaps possible to consider the language of *Reiter v. Cooper* as an implicit adoption of the *In re: Smith* holding, it is impossible to conclude that *Reiter v. Cooper*, through its reference to *In re: Smith*, concluded that recoupment is applicable to § 1635(f)'s expiration of the right to rescind. *In re: Smith*, which did not even conclude that recoupment was otherwise applicable to § 1640 claims, certainly does not stand for that proposition.

Respondent does not dispute Petitioners' conclusion that a defense is not an action. If § 1635(f), like § 1640(e), required that an action be filed within a specific period of time, then recoupment would likely be appropriate. Petitioners' distinction between an action and a defense provides this Court with the precise information it needs to understand why *Bull v. United States*, *Reiter v. Cooper* and *In re: Smith* and the other federal cases cited by Petitioners are inapplicable and therefore do not conflict with *Beach*. While each of those cases dealt with the applicability of recoupment to classic statutes of limitation, which limit the time for bringing an action, § 1635(f) could not, in a clearer manner, show Congress' intent that the right of rescission expires. As this Court at least inferred in *Western Pacific*, 352 U.S. 59, 72, clear Congressional language can limit the applicability of recoupment. By providing for the expiration of the right, Congress did not focus on the bringing of an action and therefore made

the three year period absolute whether rescission is sought affirmatively or defensively. Petitioners cannot claim that they have not sought to enforce a right of rescission well beyond the three year time frame set forth in § 1635(f). The Florida Supreme Court's analysis on this point should not be disturbed.

Petitioners incorrectly assert that *Beach* is in conflict with *James v. Home Construction of Mobile*, 621 F.2d 727 (5th Cir. 1980). While the *James* court did attack the distinction between statutorily created rights and common law rights, the court's main focus was on establishing congressional intent. Since § 1635(f) was a substantive amendment and Congress did not indicate an intention to apply that provision retroactively, the court held that its impact should only be applied prospectively. *Beach* similarly sought to determine Congressional intent.

Notwithstanding Petitioners' argument to the contrary, the significance of a statute which both creates a right and places time restrictions on that right is still recognized by the federal courts. In *Sarfati v. Wood Holly Associates*, 874 F.2d 1523 (11th Cir. 1989), the court recognized that Congress had extended the limitation period on claims under the Interstate Land Sales Full Disclosure Act from two (2) years to three (3) years shortly after the Sarfatis' cause of action had accrued. The *Sarfati* court recognized that a statute of limitations that restricts a right created by statute rather than a right at common law, generally is deemed to be a substantive limit on the right as opposed to a mere procedural limit on the remedy [citations omitted]. *Sarfati*, 874 F.2d at 1525. Since the limitation was on the right rather than the remedy, the court held that the amendment did not apply to causes of

action already in existence on its effective date. Thus, despite the language in *James v. Home Construction of Mobile*, 621 F.2d 727, the Eleventh Circuit has more recently recognized limitations on the right rather than the remedy where they are created statutorily and appear in the same statute. *See also, Lujan v. Regents of University of California*, 69 F.3d 1511 (10th Cir. 1995) (where a statute of limitation does not merely bar the remedy for the violation of a right but limits or conditions the right itself, courts have treated the statute as substantive). While these cases talk of statutes of limitation, and *Beach* considered § 1635(f) to mirror a statute of repose, the key focus is on the limitation of the right rather than the action.

PETITIONERS HAVE NOT PROVIDED THIS COURT WITH LEGISLATIVE HISTORY WHICH JUSTIFIES IN ANY WAY THE GRANTING OF CERTIORARI

The Petitioners' review of legislative history is misplaced and clearly irrelevant to the question presently before the Court. Congress passed the Truth-in-Lending Simplification and Reform Act in 1980, substantially overhauling TILA. *Beach* properly recognized the significance of Congress' choice to amend § 1640(e) (which provided for the bringing of an action within one year) by adding particular recoupment language while failing to add similar language to § 1635(f). Petitioners failed to mention that § 1635(f) was amended as well in 1980, to extend the right to rescind if an enforcing agency institutes a proceeding to enforce the provisions of the Truth-in-Lending Act within three (3) years after the date of consummation, finds a violation, and the obligor's right to rescind is based in whole or in part on any matter involved in such

proceeding provided the action is brought within one (1) year following the conclusion of the enforcing agency's proceeding.

Petitioners treat the language of § 1635(f) as if the three (3) year time frame should simply be ignored. The objective of the amendment adding § 1635(f) was "to limit the time the right of rescission may run". December 1972 Report of the National Commission on Consumer Finance, Page 190. If Congress were only concerned with barring rescission claims once a borrower sells his home, they could have easily limited § 1635(f) to that purpose.

TILA RESCISSION IS NOT EQUITABLE

The conclusion reached in *Beach* that TILA rescission is a penalty, is consistent with the holding in *Williams v. Homestake Mortgage Co.*, 968 F.2d 1137 (11th Cir. 1992). The focus of the *Williams'* court was on the appropriateness of permitting equitable modification to the harsh consequences of rescission. Jurisdiction should not be invoked to further analyze the penal nature of the rescission right.

Clearly, the purpose for rescission is to address both individual wrongs and wrongs to the public. The Beaches have argued on numerous occasions throughout the stages of this litigation, that the Act imposes a system of strict liability. *Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371 (11th Cir. 1984). Relying on *In re: Porter*, 961 F.2d 1066, 1078 (3rd Cir. 1992), the Beaches have asserted that the intent of the lender and the knowledge and reliance of the borrower on the disclosures are irrelevant in determining whether to permit the consumer to rescind. The

Act contemplates the creation of a system of private attorneys general to protect consumers generally and avoid the need for a large enforcement bureaucracy. The statutory rescission remedy, which is far more costly than actual or statutory damages (particularly if post-expiration relief is permitted) is a part of that system and is designed to generate overall compliance by lenders.

While it is true that the recovery will run to the individual rather than the public, it is difficult to see how the recovery is anything but disproportionate to the harm suffered. Simply because one purpose of the remedy is to allegedly restore the parties to the status quo ante, does not change the clear fact that the recovery is unrelated to the harm. In fact, proof of any harm is irrelevant. It does not matter whether the disclosure error relates to the failure to include a material term (like APR) on the disclosure statement, involves the miscalculation of the finance charge by as little as $10.01 (since the relevant tolerance for this case was $10.00) or millions of dollars, or alternatively, relates to the complete failure to provide any disclosures to the borrower. In each circumstance, the remedy is precisely the same. It does not matter whether the borrowers engaged in credit shopping or would have sought the loan from another lender if the disclosures were perfect. It does not matter whether the borrower has sought and recovered actual damages. The objective is to punish the lender to encourage future compliance by that lender and all others in the marketplace.

One need only to consider the facts of the instant case to determine that rescission is not remedial. The only violations found by the court below related to an incorrect calculation which led to an overstatement of the

finance charge (which in accordance with the 1995 amendments and *In re: Ramsey*, 176 B.R. 183 (9th Cir. BAP 1994) does not constitute a violation) and the alleged misdisclosure of the intangible tax, with the final result being that the finance charge was overstated by $7.24. Petitioners cannot be heard to complain that had they credit shopped they would have chosen another lender once they knew the "true credit terms". Thus, there is no harm to the Beaches to be remedied by permitting rescission. Clearly, the intent, in a circumstance like the one existing in this case, if the claim had been brought before the right to rescind had expired, would be to punish Great Western, for not precisely calculating the figures which were disclosed, through a windfall being awarded to the Beaches as an enforcement tool to generally benefit the public.

In fact, the remedy does not really restore the parties to the status quo. What the Beaches essentially seek is an interest free loan from the date of consummation to the date they are successful on their truth-in-lending rescission claim. The lender, at best, will only recover an amount which is, in fact, less than the principal it originally disbursed.

Throughout their petition, the Beaches imply that Great Western somehow acted in bad faith and profited from the alleged misdisclosures. As referenced above, that inference is simply not true. Great Western's overdisclosure was never shown to be intentional and did not harm the Beaches in any fashion. The Petitioners' argument that shielding creditors after three (3) years will result in other creditors intentionally violating TILA, is absurd and should be directed to Congress. Creditors will

continue to be monitored by the Federal Reserve Board and various enforcement agencies in states in which they lend funds. Additionally, they will be subject to truth-in-lending damage claims and timely raised rescission claims. Since the percentage of loans in default is small, and the percentage of defaulting borrowers who raise truth-in-lending rescission rights is even smaller, it is improbable to assume that lenders will stop complying with TILA based on the *Beach* decision.

CONCLUSION

Clearly, this is not an issue requiring resolution by this Court. Congress has intentionally permitted states to act independently in their enforcement of the Truth-in-Lending Act. This is particularly true with the concept of recoupment. The question answered by the Florida Supreme Court concerned Florida law. It properly analyzed the language used by Congress in determining that the expiration of the right to rescind was a meaningful concept rather than imprecise language which was

intended to bar only actions rather than defenses. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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